IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 10-0109

RENEE GRIFFITH)
Plaintiff and Appellant,)
)
and)
)
BUTTE SCHOOL DISTRICT NO. 1,)
CHARLES UGGETTI AND JOHN)
METZ,)
Defendants and Appellees.)

ORIGINALLY ON APPEAL FROM THE
MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY
THE HONORABLE GREGORY R. TODD

PLAINTIFF AND APPELLANT'S REPLY BRIEF

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I. GRIFFITH'S CLAIMS ARE NOT MOOT

The Defendants argue that this case is moot, relying upon the Notice of Appeal and the indication in that appeal that this case does not involve "monetary damages." And it is true that Griffith's goal in bringing this action and this appeal is not to obtain money from the Defendants. Instead, this case seeks to vindicate the fundamental constitutional rights of which Griffith was deprived when the Defendants refused to allow her to briefly recognize her religious beliefs in her valedictory remarks.

In cases of this kind, nominal damages are the appropriate relief where it is determined that the plaintiff has been deprived of his or her constitutional rights. *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n. 11 (1986). Where a plaintiff seeks to vindicate constitutional rights, the attendant and symbolic claim for and right to receive nominal damages is a sufficient concrete interest to prevent an action from becoming moot. Thus, in *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 426-27 (9th Cir. 2008), the court held that students' claims for nominal damages in cases alleging that a school policy deprived them of their First Amendment rights prevented the claims from becoming moot even though the students no longer attended the school. Griffith's Complaint clearly requested she

be awarded nominal damages, and was therefore sufficient to prevent this case from becoming moot upon her graduation from Butte High School.

In executing the Notice of Appeal and asserting that this case does not ask for monetary damages, Griffith's counsel clearly did not intend to abandon or waive Griffith's claim for nominal damages, which was the primary relief sought in the Complaint. The statement in the Notice was simply a recognition that this is not a case about obtaining money compensation for injuries, pecuniary or personal, which could be mediated to a resolution if a sufficient sum of money could be agreed upon by the parties. Indeed, Griffith previously rejected the Defendants' offer of a substantial sum of money as settlement. This case is about establishing and vindicating constitutional rights, and because only nominal damages are recoverable for the violation of that right, counsel noted in the Notice of Appeal that "monetary damages" are not the issue.

In light of the fact that Griffith clearly requested nominal damages in her Complaint, the Defendants' mootness argument is of necessity based upon the idea that Griffith waived or abandoned her request for nominal damages. Indeed, the Defendants did not claim in the district court that the case was moot even though Griffith had already graduated from high school, so their claim that the case is moot must be based upon the Notice of Appeal having the effect of a waiver. But there is a presumption against a waiver of rights and any such waiver "'must be

deliberately and understandingly made, and the language relied upon to constitute such a waiver must clearly, unequivocally and unambiguously express a waiver of this right.'" *Kloss v. Edward D. Jones & Co.* , 2002 MT 129 ¶ 72, 310 Mont. 123, 146, 54 P.3d 1, 16 (quoting *May v. Figgins* (1980), 186 Mont. 383, 394, 607 P.2d 1132, 1138-39). Griffith's decision to vigorously pursue this appeal is a clear indication that she did not intend to waive her claim to nominal damages and thereby effectively moot her case.

II. GRIFFITH'S CLAIMS FOR DEPRIVATION OF HER STATE AND FEDERAL CONSTITUTIONAL RIGHTS ARE NOT BARRED BY MONT. CODE § 49-2-512(1).

A. The Gravamen of Griffith's Claims is Unconstitutional Censorship and Not Discrimination for Which Relief Is Available Under the MHRA.

The Defendants' argument in support of the District Court's application of the "exclusive remedy" provision of Mont. Code Ann. § 49-2-512(1) is accurate in asserting that the fact that a claim is, out of an abundance of caution and in order to preserve all available remedies, filed with the Montana Human Rights Bureau as a discrimination claim does not control whether other claims based upon the same facts are barred by the MHRA's "exclusive remedy" provision. "[T]he fact that a claimant first characterizes the subject conduct as discrimination and pursues a MHRA action does not of itself establish conclusively what the gravamen of the

claim actually is[.]" *Saucier v. McDonald's Restaurants of Montana, Inc.*, 2008 MT 63, ¶ 58, 342 Mont. 29, 46, 179 P.3d 481, 494.

Yet, contrary to the argument in the Defendants' Brief, it was precisely because Griffith sought to preserve all available remedies by filing an MHRA discrimination claim that the District Court held that *all* her claims were based upon "discrimination." It wrote as follows:

> The gravamen of Griffith's complaint with the State of Montana Human Rights Bureau, her Complaint in this Court, and her Motion for Summary Judgment all argue that the conduct of the Defendants constituted "discrimination in education in violation of Mont. Code Ann. § 49-2-307(1)." . . . In her Complaint, Griffith claims that she was prevented from giving her high school valedictory address on the basis of her refusal to remove religious references from her proposed speech. Consequently, she asserts that these allegations constitute discrimination in education and are a violation of the Governmental Code of Fair Practices. Griffith then goes on to assert that the same alleged acts of the Defendants also violate various provisions of the United States and the Montana Constitutions. The same set of facts form the basis for each separate cause of action. This Court concludes that counts III and IV of Griffith's Complaint, which are framed as state Constitution freedom of religion and freedom of speech actions, are more properly characterized as discrimination of religion and speech claims.

(District Court Order, pp. 6-7). This passage makes clear that the District Court determined that because Griffith couched her claim in the Human Rights Bureau and in her Complaint as a "discrimination" claim and her free speech claims were based upon the same factual allegations, the speech claims were barred by the exclusivity provision. Indeed, the District Court provided no other basis for its

ruling that the "gravamen" of Griffith's freedom of speech claims was discrimination covered by the MHRA.

The District Court's error is clear in light of its ruling that "counts III and IV of Griffith's Complaint, which are framed as state Constitution freedom of religion and freedom of speech actions, are more properly characterized as ***discrimination of religion and speech claims***." (District Court Order, p. 7) (emphasis added). Thus, the District Court apparently believed that "discrimination . . . of speech" is discrimination covered by the MHRA. But as the Montana Human Right Division's investigator made clear the Division "has no authority to investigate free speech violations and this report does not address that issue." (Final Investigative Report, p. 4.). Clearly, suppression of speech by the government is not "within the MHRA's definition of 'discrimination.'" *Saucier*, ¶ 70.

The misguided approach taken by the District Court also is adopted by the Defendants in their brief. They base their argument that the "gravamen" of this case is MHRA discrimination by repeatedly referring to the allegations of the Complaint's claim under the MHRA. (Brief of Defendants, pp. 10-11). Again, the fact that a claimant first characterizes the subject conduct as discrimination and pursues a MHRA action does not of itself establish that the gravamen of the claim actually is MHRA discrimination. *Saucier*, ¶ 58. Any prudent litigant will clearly seek to preserve and raise all legitimate claims, especially when there is a rather

unique administrative gatekeeper, but she should not be held to be judicially bound to that theory.

The Defendants consistently argued, and the District Court found, that there was no discrimination among religions in this case. The District Court wrote:

> As pointed out by the Defendant it is the policy and practice of the District to not permit religious references of any kind during graduation ceremonies. . . .
>
> * * * * *
>
> The policies and practices of the District prohibiting religious speech during graduation ceremonies are applied evenly to all student speakers. . . .

(District Court Order, p. 12). The position of the Defendants, adopted by the District Court, is that there was no discrimination on the basis of religion because all persons, regardless of religion, were treated the same. The gravamen of this case is not discrimination, leaving aside the secular humanist argument not addressed by the Defendants, against persons on the basis of their religion, but suppression of expression because of its religious viewpoint. This is a classic example of a violation of the constitutional protection of free speech. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 830-31 (1995) (holding that exclusion of discussion of religion from a forum constitutes viewpoint discrimination that violates the First Amendment) and *Denke v. Shoemaker*, 2008 MT 418, ¶ 48, 347 Mont. 322, 338, 198 P.3d 284, 297.

The Defendants also denigrate the investigator's conclusion regarding the scope of the MHRA, ignoring the settled rule that this Court gives deference to the statutory interpretation advanced by the agency charged with administering the statute. *See e.g. State ex rel. Holt v. District Court,* 2000 MT 142, ¶ 10, 300 Mont. 35, 3 P.3d 608. More to the point, the Defendants fail to refer to any provision of the MHRA which authorizes the Human Rights Division to receive complaints of, investigate, and grant relief for violations of the right to free speech guaranteed by the state or federal constititution. As indicated by the Division itself, this is a case where "the alleged conduct goes beyond the type of discriminatory actions contemplated by the MHRA," *Saucier*, ¶ 80, and so Griffith's claims under the state and federal constitutions were improperly dismissed under the "exclusive remedy" provision of the MHRA.

While the Defendants place great reliance upon the decision in *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, that case has little relevance here other than to demonstrate the application of the "exclusive remedy" provision to a case involving sexual harassment. *Harrison* simply held, in accordance with the clear intent of the legislature in enacting § 49-2-512(1), that sexual harassment claims may be pursued only under the MHRA and not through tort claims. This ruling says nothing about whether speech censorship constitutes "discrimination" as defined in the MHRA or whether the gravamen of such a case is discrimination.

The Defendants also rely upon *Edwards v. Cascade County Sheriff's Dept.*, 2009 MT 451, 354 Mont. 307, 223 P.3d 893, as supporting application of the exclusive remedy provision here. However, as the portions of the *Edwards* decision quoted by the Defendants stress, this Court held that the plaintiff's state constitutional claims were barred because "the [a]ppellants were required . . . to present them to the HRB in order to preserve them in the District Court," and the appellants were barred from raising them for failure to comply with the MHRA. *Id.* ¶¶ 56-57. In this case, Griffith did raise the state constitutional claims with the HRB, but received no consideration of those claims because the HRB determined it does not have the authority to investigate or correct free speech violations. Griffith's case is wholly different from *Edwards* because she did preserve the state constitutional claims.[1]

B. The Supremacy Clause of the U.S. Constitution Forbids Application of the MHRA's Exclusive Remedy Provision to Griffith's Claims under 42 U.S.C. § 1983.

In defense of the District Court's application of Mont. Code Ann. § 49-2-512(1) to bar Griffith's claims under federal law, the Defendants attempt to diminish the effect of legislative history underlying the exclusive remedy statute cited in Griffith's Brief. However, that same legislative history was cited by this Court in *Harrison*, 244 Mont. at 219-20, in noting that § 49-2-512(1) was passed in

[1] It should be pointed out that the ruling in *Edwards* related only to claims under the Montana Constitution and not claims under the United States Constitution. The appellants in that case had dismissed their federal claims under 42 U.S.C. § 1983 earlier in the litigation. *Edwards*, ¶ 24.

response to the ruling in *Drinkwalter v. Shipton* (1987), 225 Mont. 380, 732 P.2d 1335, and to make proceedings before the HRB the "exclusive remedy for discrimination in employment."

The Defendants also assert that this Court may not consider the Supremacy Clause issue raised by the District Court's application of § 49-2-512(1), arguing that notice of this issue was required to be given to the attorney general under Mont. R. App. P. 27. However, independent notice is required to be given only in cases where "neither the state nor any agency or any officer or employee thereof" is a party to the action. The Defendants wrongly assert that *Weinart v. City of Great Falls*, 2004 MT 168, 322 Mont. 38, 97 P.3d 1079, holds that political subdivisions and local governments are not considered the state or a state agency for purposes of this rule. *Weinart* held that a city was not an agency of the state because it had adopted a self-government charter under Mont. Const. Art. XI, § 6, and so operated under the constitution. *Weinart*, ¶ 15. This Court noted that before the adoption of Art. XI, § 6, cities were "state agencies" because they were "creatures of statute." *Weinart*, ¶ 14 (citing *State v. City of Great Falls* (1940), 110 Mont. 318, 328, 100 P.2d 915, 920.)

In contrast to cities, school districts, such as the District here, are creatures of statute. *See* Mont. Code Ann. § 20-6-101 ("As used in this title, the term 'district' means the territory, regardless of county boundaries, *organized under the*

provisions of this title to provide public educational services under the jurisdiction of the trustees prescribed by this title."). Indeed, a school district "is an instrumentality of the state government, and to this extent is part of the state sovereignty created by the Constitution to perform the public function of educating the future citizens of the state and nation. Its influence is public coextensive with the state, and the interest in its welfare is public." *State ex rel. Fisher v. School Dist. No. 1 of Silver Bow County* (1934), 97 Mont. 358, 34 P.2d 522, 525. As such, the District is an agency of the State of Montana and, because the District is a party to this action, no notice was required to be given under Rule 27.

Moreover, Rule 27's notice requirement applies only where a party "challenges the constitutionality of an act of the Montana legislature[.]" Its purpose is to give the attorney general an opportunity to defend an act of the legislature against legal action seeking to invalidate the legislation. *Matter of W.C.* (1983), 206 Mont. 432, 439, 671 P.2d 621, 624. In this case, Griffith is not asserting, nor has she previously asserted, that § 49-2-512(1) is invalid, unconstitutional or that it may not be enforced.

Griffith's claim is not that the statute is unconstitutional and must be voided, but that the District Court was, and this Court is, obligated by the Supremacy Clause to hear and decide Griffith's federal law claims. The relief sought here is not that the statute or any part thereof be stricken, but only that the courts of this

State hear and decide Griffith's claims under 42 U.S.C. § 1983 seeking relief for deprivation of her rights under the United States Constitution. If that relief is granted here, the existence of § 49-2-512(1) is not affected. Under these circumstances, a "challenge to the constitutionality" of the statute for purposes of Rule 27 is not involved and so the notice set forth in that rule was not required.

With respect to the Defendants' substantive arguments that Griffith's federal claims are barred by the MHRA's exclusivity provision, the assertion that the provision is a "neutral" bar on federal causes of action and applies to all claims is simply incorrect. Section 49-2-512(1) applies only to "discrimination" claims, and so is not a neutral rule of judicial administration that applies regardless of the subject matter of the lawsuit. It unlike a venue provision or a rule of forum non conveniens that apply regardless of the subject matter of the lawsuit, rules which the Supreme Court has indicated may be applied consistent with the Supremacy Clause. *Haywood v. Drown*, 129 S. Ct. 2108, 2116 (2009). The Defendants argument concerning neutrality is specifically refuted by the following ruling in *Haywood*:

> A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear. As we made clear in *Howlett[v Rose*, 496 U.S. 356 (1990)], "[t]he fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." 496 U.S., at

381. Ensuring equality of treatment is thus the beginning, not the end, of the Supremacy Clause analysis.

Id. at 2116.

The Defendants are correct in arguing that § 49-2-512(1) does not divest Montana courts of jurisdiction over claims under 42 U.S.C. § 1983 (Defendants' Brief, p. 23). Consistent with the Supremacy Clause and controlling Supreme Court precedent, the statute could not do so. But that is precisely what the District Court did in this case; it improperly used the statute to "avoid the obligation [of state courts] to enforce federal law[.]" *Haywood*, 129 S. Ct. at 2116. Defendants argue that the statute was simply applied to eliminate "duplicative claims" from consideration. Even were this true, "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983. A plaintiff, for example, may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common-law remedies for trespass and conversion." *Zinermon v. Burch*, 494 U.S. 113, 124-125 (1990).

* * * * *

The implications of the decision below and the position taken by the Defendants here upon the remedies available to citizens of Montana cannot be minimized. If the decision below is affirmed, then the Montana courts will not be open to claims under the constitution that school officials have engaged in

viewpoint-based censorship. Indeed, because Mont. Code Ann. § 49-2-308(1) also prohibits discrimination by *any* state entity and is covered by the exclusive remedy provision, viewpoint-based censorship claims under the state and federal constitution (which by necessity may be brought only against state actors) will be subject to dismissal under the reasoning employed by the District Court and supported by the Defendants. Not only will censorship claims involving religious viewpoints be barred, but any claim where the viewpoint relates to "race, creed, religion, sex, marital status, color, age, physical or mental disability, or national origin" will be subject to dismissal. Mont. Code Ann. § 49-2-308(1).

Moreover, even though precedent establishes that viewpoint-based censorship is justified only by some "compelling interest," *Good News Club v. Milford Central Schools*, 533 U.S. 98, 112-13 (2001), a government entity in an MHRA discrimination case need only show a "reasonable ground" for its action. Mont. Code Ann. §§ 49-2-307(1) and 49-2-308(1). If the decision below is upheld, a government entity is free to engage in viewpoint-based censorship if there is some reasonable basis and no relief would be available from the Montana courts.

II. JUDGMENT SHOULD BE ENTERED IN FAVOR OF GRIFFITH ON HER CLAIMS FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS.

A. Free Speech Claims

The Defendants' first response to Griffith's free speech claims under the state and federal constitutions is that the May 2008 graduation ceremony was not a limited public forum with respect to speech by valedictorians such as Griffith. However, they cite no facts to support this claim, other than the fact that the District reserved the right to review student speeches. The facts of record are crucial, as a court must look to the policies and practices of a governmental entity to determine the nature of the forum, as well as the nature of the property and its compatibility with expressive activity. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). As Griffith pointed out in her previous brief, the District not only had a policy and practice of allowing valedictorians to give remarks at their graduation, but had promulgated a specific policy recognizing the free speech rights of graduations speakers, disclaiming any endorsement of the content of speeches, providing that presentations constitute the "private expression" of participants (Butte School Dist. Policy 2333; Appendix 2). In light of these policies and practices and previously-cited law, the graduation ceremony was a limited public forum.

The Defendants minimize the effect of the decision in *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1230-31 (D. Wash. 2007), *aff'd*, 580 F.3d 1087 (9th Cir. 2009), *cert. denied*, 2010 WL 1006063 (Sup. Ct. March 22, 2010). However, the school defendants in *Nurre* did not challenge on appeal the district ruling that the

evidence supported the creation of a limited public forum at a graduation ceremony. Of course, the school defendants in *Nurre* likely did not challenge the ruling because it was correct. Moreover, the Defendants fail to address Justice Alito's conclusion that a limited public forum existed in *Nurre*. *Nurre*, 2010 WL 1006063, at *2.

The Defendants also place great reliance upon *DiLoreto v. Downey Unif. Sch. Dist. Bd. of Ed.*, 196 F.3d 958 (9th Cir. 1999), to support their claim that the censorship of Griffith did not involve viewpoint discrimination, but was a legitimate content-based exclusion. But their reliance on *DiLoreto* is misplaced. In *DiLoreto,* the Court upheld a school district's refusal to post the text of the Ten Commandments on a baseball field fence. The Court concluded that the refusal was permissible content-based discrimination because the forum itself had been limited to business advertising. *See id.* at 969 ("Mr. DiLoreto's ad was not a statement addressing otherwise-permissible subjects from a religious perspective...."). *DiLoreto* described "viewpoint discrimination" as when the government targets "not subject matter, but particular views taken by speakers on a subject." *DiLoreto*, 196 F.3d at 968-69. That is precisely what occurred here; Griffith sought to speak about what she learned in school, but was forbidden because part of her intended remarks were from a religious viewpoint, apparently not in keeping with the viewpoint of the Defendants.

A close examination of the authorities demonstrates that the Defendants here committed viewpoint discrimination. The distinction between viewpoint and subject-matter discrimination has been described as follows:

> In order to preserve the limits of a limited public forum, however, the State may legitimately exclude speech based on subject matter where the subject matter is outside the designated scope of the forum. . . . "The necessities of confining a [limited public] forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger*[*v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995)].
>
> The line between an acceptable subject matter limitation and unconstitutional viewpoint discrimination is not a bright one. To determine if a restriction on speech in a limited public forum is viewpoint discriminatory, we apply the guidelines established by the *Lamb's Chapel* [*v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)] line of cases. *See Good News Club* [*v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 109 (2001)]; *Rosenberger,* 515 U.S. at 829-30; . . . The issue of the restriction's viewpoint neutrality therefore turns on the nature of the forum in relation to the subject matter limitation-if the speech at issue does not fall within an acceptable subject matter otherwise included in the forum, the State may legitimately exclude it from the forum it has created. However, if the speech does fall within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker.

Cogswell v. City of Seattle 347 F.3d 809, 815 (9th Cir. 2003).

The Defendants' argument that the censorship of anything religious from the graduation ceremony constitutes a content-based regulation is contrary to precedent. For example, in *Rosenberger*, 515 U.S. at 830-31, university administrators made the same argument that they could exclude all funding of

student publications that had addressed religion because they were making distinctions on the basis of content. The Supreme Court rejected this argument and found that the university was engaged in viewpoint discrimination. Similarly, in *Gentala v. City of Tucson*, 213 F.3d 1055, 1065 (9th Cir. 2000), the court held that a program which funded organizations holding civic events in city parks but which excluded any funding for religious organizations constituted viewpoint-based censorship and not a content-based exclusion.

The Defendants also claim that there is something fundamentally different about a graduation ceremony that apparently allows the government to engage in viewpoint-based censorship of expression. It cites *Cole v. Oroville Union High School*, 228 F.3d 1092 (9th Cir. 2000), to support this notion, but for the reason set forth in Griffith's principal brief, that case is clearly distinguishable and does not justify the viewpoint discrimination perpetrated in this case. The decision in *Lassonde v. Pleasanton Unif. Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003), simply followed *Cole*, and so is similarly not controlling here. The ruling in *Lassonde* was that censorship of a proselytizing speech was necessary to avoid an Establishment Clause violation because the speech would bear the imprimatur of the school. Here, there would be no imprimatur because of the specific disclaimer published in the Butte High School graduation ceremony program. Additionally, even to the extent that *Cole* is correct that listening to a proselytizing speech requires one to

engage in a religious exercise, Griffith's speech was not proselytizing, but expressed what *she* learned in school.

The Defendants also decry the fact that if Griffith's claims are upheld, that there will be no "clear line" and school administrators will be required to make judgment calls regarding what religious remarks to allow at graduation and what remarks not to allow. But the fact that administrators must make decisions in determining what speech is allowed and what is not is plainly no ground for denying Griffith's claims. It would always be easier to simply ban all student expression, religious or otherwise. But students clearly have a right of free speech, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and unless that right is eliminated, school officials who censor speech will be at risk of violating the constitutional right to free speech.

Moreover, the fears expressed by the Defendants are greatly minimized by the principle of qualified immunity which shields individual defendants from liability for constitutional deprivations unless their conduct violates "clearly established" law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). However, what courts must not allow is the establishment of a school district policy censoring all religious expression regardless of whether the Establishment Clause would be violated by the expression, such as is involved in this case.

B. Free Exercise of Religion Claim

The Defendants' only response to Griffith's claims under the First Amendment's "free exercise" clause and Mont. Cont. Art. II, § 5, is that Griffith has not identified any conduct "proscribed" by her religious beliefs that she was forced to engage in. But as pointed out in the case cited by the Defendants, *Valley Christian School v. Montana High Sch. Assn.*, 2004 MT 41, ¶ 7, 320 Mont. 81, 86 P.3d 554, an actionable burden on religion also exists when the government denies a benefit "because of conduct mandated by religious belief[.]" Here, Griffith alleged that her religious beliefs required her to include recognition of her faith in her graduation remarks. The Defendants denied Griffith the benefit of speaking at her graduation because her beliefs required that she acknowledge (however briefly) her faith. As such, the Defendants imposed a substantial burden on Griffith's religion in violation of the constitutional guarantees to free exercise of religion.

C. Equal Protection Claims

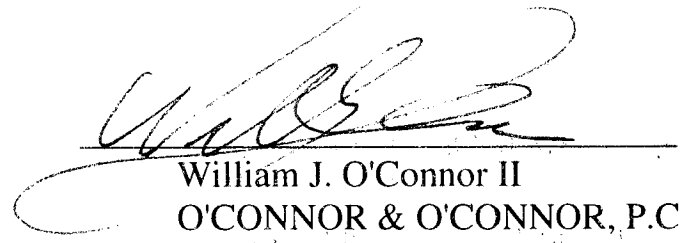
In response to Griffith's equal protection claim, the Defendants refer to a District policy allowing students to engage in religious activity while at school. Of course, this policy is beside the point because the Defendants have admitted that they have a policy forbidding any religious expression at graduation ceremonies and this is the basis for Griffith's equal protection claim. That policy clearly

discriminates on the basis of religious viewpoint and is subject to strict scrutiny under the Equal Protection Clause. The Defendants have not shown either that there is some compelling interest behind the policy (since it was not directed solely at graduation expression which would implicate the Establishment Clause), or that it was narrowly tailored to serve a compelling interest. The fact that some other policy allows student religious expression in other contexts is of no moment in justifying the policy at issue here.

CONCLUSION

For the reasons set forth above, Renee Griffith respectfully requests that the judgment of the District Court be reversed and that this Court enter judgment in her favor on all her claims.

Respectfully submitted,



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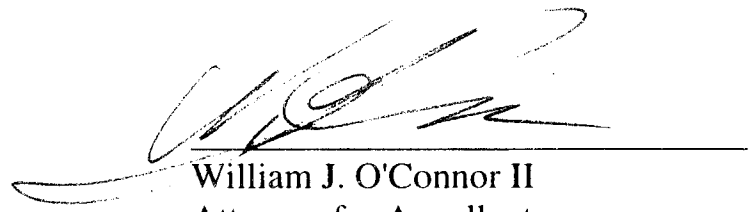
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003, and the word count is 4,910 excluding the matters set forth in Rule 11(4)(d) of the Montana Rules of Appellate Procedure.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff/Appellant's Reply Brief was served on this 30th day of July, 2010 upon the following:

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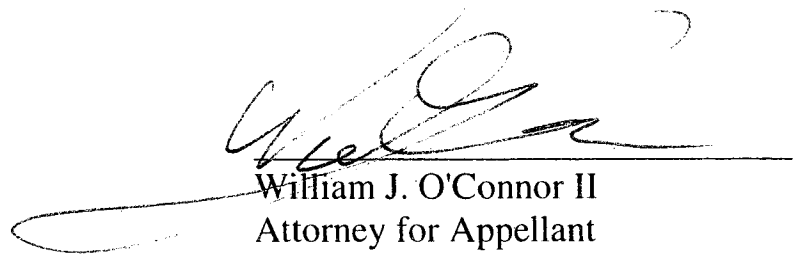

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